FILE COPY

SUPREME COURT OF THE [illegible]

OCTOBER TERM, 1932

No. 516

J. T. ROBERTS, *Appellant*,

vs.

RICHLAND IRRIGATION DISTRICT, an Irrigation District; C. J. BARNETT, W. A. STOCKMAN, and W. C. MORRIS, Directors of the Richland Irrigation District, an Irrigation District; and HARRY FORSYTH, Treasurer of Benton County, Washington; E. J. PACHUS, IRA C. HAWLEY, and H. S. HUGHES, County Commissioners of Benton County, Washington, Defendants; J. T. S. LYLE, DIX ROWLAND, CHARLES HEATH, T. H. BOWDEN and H. E. DAVENPORT, Individually and as Trustees, Intervenors, *Appellees*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLANT'S REPLY STATEMENT AS TO JURISDICTION

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SUPREME COURT OF THE UNITED STATES

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J. T. ROBERTS, *Appellant*,

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On December 5, 1932, this Court reserved a final ruling upon the question of jurisdiction until the hearing on the merits. We, therefore, deem it appropriate, by analogy to Rule 7 (3) of the Revised Rules of the Supreme Court of the United States, to present to this Court the following matter by way of reply to Appellees' Statement Against Jurisdiction.

I.

The State Supreme Court Necessarily Passed on the Federal Question Presented Herein by Appellant.

On page two of Appellees' Statement Against Jurisdiction, it is admitted that the State Supreme Court did in fact pass upon the Federal Constitutional question presented by the Appellant herein, but it is said it was not necessary for it to do so.

A. THE FEDERAL QUESTION PRESENTED BY APPELLANT IS THE ONLY ONE IN THIS CASE.

There was no other question in the case. The complaint was carefully framed to present said Federal question. The State Supreme Court recognized this fact and passed upon that Federal question as the only one presented:

> "Is the annual assessment against each tract of land within an irrigation district for the payment of interest or the principal of bonds, issued to pay the cost of irrigation district improvements, limited to the maximum benefits accru-

ing to the tract of land by reason of such improvements? That is the only question, which is not an open one in this state, presented by this appeal."

Roberts v. Richland Irrigation District, et al., 69 Wash. Dec. 108, 111; 13 Pac. (2d) 437, 438 (R. 24.),

and

"* * * It is insisted that the statute, if it authorize the annual levy of assessments for bond purposes in excess of benefits received from such bond issue, is unconstitutional in that the taking of property without due process of law is thereby made possible. * * *"

Roberts v. Richland Irrigation District, et al., supra, page 111 in Wash. Dec., and page 438 in 13 Pac. (2d) (R. 25.)

and also

"Our Irrigation Statute in no wise offends against the State Constitution *or the United States Constitution.* We have considered all of the authorities cited and deem it unnecessary to review them, as *State ex rel. Wells v. Hartung*, 150 Wash. 590, 274 Pac. 181, is determinative of the case at bar." (Italics ours.)

Roberts v. Richland Irrigation District, et al., supra, page 115 in Wash. Dec., and page 440 in 13 Pac. (2d) (R. 29.)

Even though the State Supreme Court used other language to the contrary, this question, having been raised by complaint (R. 1.) and demurrers thereto (R. 15, 16, 17.), this Court will determine for itself from the admitted allegations of the complaint

whether the Federal constitutional question, presented by Appellant, was necessarily passed upon by the State Supreme Court, and will not be concluded by the view taken of them by the State Supreme Court.

In *Truax, et al., v. Corrigan, et al.*, 257 U. S. 312, 324, this Court said:

> "The facts alleged are admitted by the demurrer and in determining their legal effect as a deprivation of plaintiffs' legal rights under the Fourteenth Amendment, we are at as full liberty to consider them as was the State Supreme Court. *Mackay v. Dillon*, 4 How. 421; *Dower v. Richards*, 151 U. S. 658, 667. Nor does the court's declaration that the statute is a rule of evidence bind us in such an investigation. *Bailey v. Alabama*, 219 U. S. 219, 238, 239; *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U. S. 418; *Mugler v. Kansas*, 123 U. S. 623, 661; *Corn Products Refining Co. v. Eddy*, 249 U. S. 427, 432. In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact or has been waived or lost, this court as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here. *Kansas City Southern Ry. Co. v. Alberts Commission Co.*, 223 U. S. 573, 591, 593; *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 223 U. S. 655, 668, 669; *Southern Pacific Co. v. Schuyler*, 227 U. S. 601, 611. * * *

> In view of these decisions and the grounds upon which they proceed, it is clear that in a case like the present, where the issue is whether a state statute in its application to facts which are set out in detail in the pleadings and are admitted by demurrer, violates the Federal Constitution, this court must analyze the facts as averred and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the State Supreme Court in this regard."

See also

First National Bank of Guthrie Centre v. Anderson, County Auditor, et al., 269 U. S. 341, 346.

B. THE ADMITTED FACTS IN THE COMPLAINT ARE THE ONLY FACTS BEFORE THIS COURT.

Counsel concede that the Federal constitutional question is raised by the allegations of the complaint, but assert that those allegations are not true in fact, and seek to substitute for them inferences of fact drawn from certain statements appearing in Appellees' briefs in the State Supreme Court.

Briefs filed in the State Supreme Court, even though they be certified to the Supreme Court of the United States by the Clerk of the State Supreme Court, as a part of the record in the State Court, do not properly form a part of the record in the Supreme Court of the United States.

Harding v. Illinois, 196 U. S. 78, 84.

Zadig v. Baldwin, 166 U. S. 485, 488.

The Appellant was denied an opportunity to prove the allegations of his complaint in the Trial Court by the admissions of the Appellees that those allegations were true and the holding of the Trial Court that they did not state a cause of action. Now, in the court of last resort, counsel concede that the allegations of the complaint do state a cause of action, but seek to avoid reversal by withdrawing the admissions of their demurrers, and substituting therefor an entirely different state of facts, which appears nowhere in the record. Acceptance of such an argument by the Court would mean the Appellant is precluded from proving the facts in the Trial Court, and from a consideration of the question of law in the Appellate Court.

II.

Statements Contained in Briefs in State Supreme Court Do Not Alter Admitted Facts in the Complaint.

We note that the so-called admissions, set forth on pages 4, 5 and 6 of Intervenor Appellees' Statement Against Jurisdiction, are with one exception drawn from their own brief in the State Supreme Court, or that of the Defendant Appellees. We are at a loss to understand how they can be construed as admissions against this Appellant.

A. STATEMENTS CONTAINED IN APPELLEES' BRIEFS IN STATE SUPREME COURT.

It is true that Appellant does not contend that the levy in question was not made in proportion to benefits. Appellant, however, asserts that the amount apportioned substantially exceeds the benefit to his land, and is, therefore, invalid. Appellant does not question the right of the Board to levy special assessments so apportioned, so long as the aggregate of the successive assessments do not substantially exceed the total amount of the maximum benefit to his land.

There are two requirements for a legal special assessment: (a) uniformity as to all parts of the assessment district; and (b) limitation of the total assessments against a specific tract to the amount of the total benefits conferred thereon.

> "When the operation of the law works uniformly as against all parts of the assessment district, and results in a higher cost of the improvement, and an increased assessment on all the owners of land who have paid, it violates no constitutional right of theirs *as long as their benefits continue respectively to exceed their individual assessments.*" (Italics ours.)
>
> *Kadow et al. v. Paul et al.*, 274 U. S. 175, 181; 71 L. Ed. 982; 47 Sup. Ct. 561.

See also:

> *Foster v. Commissioners of Cowlitz County*, 100 Wash. 502; 171 Pac. 539.

Boyd et al. v. Cunningham et al., 164 Wash. 335; 2 Pac. (2d) 647.

Perkins & Co. v. Diking District No. 3 of Island County, 162 Wash. 227; 298 Pac. 462.

See, also, *1 Page and Jones on Taxation by Assessment*, p. 197, Sec. 118, 1909 Ed.:

> "If the assessment is not apportioned in substantially the same ratio as the benefits, *or if it is substantially in excess thereof, such assessment is invalid as amounting to a taking of property without due process of law.*" (Italics ours.)

B. STATEMENTS CONTAINED IN APPELLANT'S BRIEF IN STATE SUPREME COURT.

Based upon the inferences drawn from Appellant's brief in the State Supreme Court, counsel argue that all assessments heretofore levied have been for interest only. This argument is fallacious:

1. The complaint alleges and the demurrers admit that special assessments have been levied against Appellant's land for both principal and interest. (R. 5, 6.)
2. The complaint alleges and the demurrers admit that no benefits of any description have accrued to Appellant's land in excess of a certain specified sum. (R. 4.)
3. The complaint alleges and the demurrers admit that Appellant has paid such benefits with interest. (R. 6.)
4. The complaint alleges and the demurrers admit that the threatened levies by the Irrigation District are not made on account of, or with reference to, any special benefits accruing to Appellant's land. (R. 6.)

We submit that these affirmative allegations, admitted by Appellees' demurrers, may not be deleted or ignored by reference to any statements in the briefs in the State Supreme Court of either Appellant or Appellees.

Arguing from these inferences, the Intervenor Appellees state (Statement Against Jurisdiction, 9) that the extension of time for the payment of principal certainly confers special benefits equal to special assessments so far levied. It is admitted that Appellant has paid his maximum benefit, with interest thereon at the bond rate. (R. 6.) The element of benefit represented by an extension of time accrued to him only to the extent that he enjoyed that extension of time for payment of *his* full liability, including interest. An extension of time to other landowners in the district, for either principal or interest, after he had paid his maximum, was not a benefit to him, but to them only.

Follow this argument to its logical conclusion. Assume that Appellant's land is "the last faithful acre" in the district; that all other landowners have ceased to pay; and that acquired lands are unsalable. Has the district then the power to annually levy the full amount of each year's interest ($32,800.00) against the lands of Appellant, and can he escape this liability only by paying such accrued interest, plus

the principal of the bonds, or would such levy constitute a taking of property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution? We assert that it does. It thus appears that this argument instead of negativing the jurisdiction of this Court, invokes it.

III.

The Sole Question Presented Herein Is: To What Extent Has the Irrigation District the Right to Levy for the Payment of Delinquencies?

On page 9 of Appellees' Statement Against Jurisdiction, it is said:

> "The district has a right to assess the deficit, caused by some of the properties not paying their assessments, upon remaining properties."

To what extent has the district the right to levy for the payment of delinquencies? That is the sole question to be determined herein. Appellant concedes that delinquencies may be levied until exactions in an amount equal to the maximum benefit to his land have been paid by him. He contends that thereafter delinquencies may not be levied against his land, and that to do so constitutes a taking of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

We contend that *Kadow et al. v. Paul et al.*, 274 U. S. 175; 71 L. Ed. 982; 47 Sup. Ct. 561, so holds;

that the Supreme Court of Washington has construed it to so hold in the case of *Boyd et al. v. Cunningham et al.*, 164 Wash. 335; 2 Pac. (2d) 647, and has so held in the following cases:

Poolman et al. v. Langdon et al., 94 Wash. 448; 162 Pac. 578.

Foster v. Commissioners of Cowlitz County, et al., 100 Wash. 502; 171 Pac. 539.

Behrens v. Commercial Waterway District No. 1 of King County, 107 Wash. 155; 181 Pac. 892.

Perkins & Co. v. Diking District No. 3 of Island County, et al., 162 Wash. 227; 298 Pac. 462.

IV.

The Case of State Ex Rel. Wells v. Hartung Et Al. Does Not Preclude This Appeal.

On page 9 of Appellees' Statement Against Jurisdiction it is said that the opinion in the case of *State ex rel. Wells v. Hartung et al.*, 150 Wash. 590; 274 Pac. 181, shows that the question raised by the Appellant herein was raised in said case by the Irrigation District and intervening landowners who appeared for themselves and all other persons similarly interested.

A. THE JUDGMENT IN STATE EX REL. WELLS V. HARTUNG ET AL. IS NOT PART OF THE RECORD BEFORE THIS COURT.

It is not contended that the Appellant herein was a party in the case of *State ex rel. Wells v. Hartung et al., supra.* Even if he had been, the record in that case would still be no part of the record herein.

Merrick v. Neely, 143 Wash. 588; 255 Pac. 956.

The case of *Merrick v. Neely, supra*, is the latest in a long line of decisions of the Supreme Court of the State of Washington which hold that a trial court will not judicially notice the record in another case though it be between the same parties and in the same court, and that an appellate court notices judicially only those matters that the trial court is obliged to notice.

See the cases of

Bartelt v. Seehorn, 25 Wash. 261; 65 Pac. 185.

Lownsdale et al. v. Grays Harbor Boom Co., 54 Wash. 542; 102 Pac. 833.

Pacific Iron & Steel Works v. Goerig, 55 Wash. 149; 104 Pac. 151.

Canal Lumber Co. v. Kong Yick Investment Co. et al., 72 Wash. 437; 130 Pac. 492.

These cases have overruled the earlier case in the State Supreme Court of *Stallcup v. City of Tacoma*,

13 Wash. 141; 42 Pac. 541, which held to the contrary of the now established rule in the State of Washington that the State Supreme Court will not take judicial notice of the record in another case even though it be between the same parties and in the same court.

The State Supreme Court has also expressly held, when considering a demurrer to the sufficiency of the complaint, that it will not entertain a contention that the appellant is precluded by a prior judgment.

Russell et al. v. Mutual Lumber Co., 134 Wash. 508; 236 Pac. 96.

It is obvious that, if such a judgment is not a part of the record in the State Supreme Court, it cannot be part of the record before this Court.

B. THE JUDGMENT IN STATE EX REL. WELLS V. HARTUNG ET. AL. IS NOT RES ADJUDICATA ON THE PARTIES HEREIN.

Under the laws of the State of Washington, a judgment against a public or municipal corporation such as in *State ex rel. Wells v. Hartung et al.*, 150 Wash. 590; 274 Pac. 181, is not binding upon the individual landowners in respect to rights which they

hold as individuals peculiar to themselves and not shared with the public.

In re Assessment for Local Improvement Sewer District No. 1, 84 Wash. 565, 571; 147 Pac. 199, 203.

State ex rel. Forgues v. Superior Court for Lewis County, 70 Wash. 670; 127 Pac. 313.

See also

23 Cyc. 1269.

Rork v. Smith et al., 55 Wis. 67; 12 N. W. 408.

Furthermore, the opinion in the case of *State ex rel. Wells v. Hartung et al., supra*, indicates that it was decided on the 1st day of February, 1929, and that the question involved was the assessment for the year 1928. It takes only a moment's consideration of the complaint herein to note the fact that the threatened action, of which the Appellant is complaining, was for the assessment coming due in 1931. (R. 6.) It might easily have been true that the Appellant herein was not entitled to relief on the date on which the complaint was filed in the case of *State ex rel. Wells v. Hartung et al., supra*, for the reason that possibly the benefits to his land had not been exhausted on that date. The Appellant herein was not bound to challenge the act of the Board until it threatened his rights. The threatened action of which the Appellant herein is complaining was conceived long

subsequent to the final judgment of the case of *State ex rel. Wells v. Hartung et al., supra.*

It is difficult to understand in view of these considerations, on what theory the defense of *res adjudicata* as urged by the Appellee Intervenors can be sustained.

C. THE JUDGMENT IN STATE EX REL. WELLS V. HARTUNG ET AL. IS NOT STARE DECISIS FOR THIS CASE.

The question herein is the determination of whether or not the special assessment objected to by Appellant is a taking of property without due process of law within the meaning of the Fourteenth Amendment to the Federal Constitution. On that question the Supreme Court of the United States is the court of last resort. It is one of the essential elements in the application of the doctrine of *stare decisis* that the decision referred to be that of a court of last resort.

Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 27 Colo. 1; 59 Pac. 607; 50 L. R. A. 209.

Posados v. Warner Barnes & Co. Ltd., 297 U. S. 340; 73 L. Ed. 729.

7 R. C. L., p. 1005.

V.

Conclusion.

In conclusion, we challenge the statement appearing upon pages 3 and 4 of Appellees' Statement Against Jurisdiction, to the effect that upon trial the facts asserted by Appellees would be established but the facts alleged in the complaint would not be established, hence a determination of the question of law herein would be unavailing. The facts alleged in the complaint are now admitted by demurrers of Appellees. (R. 15, 16, 17.) If necessary, the Appellant will prove them upon trial. The rights of the parties, therefore, depend upon the answer which this Court gives to the legal questions presented by this record.

The sole question presented by this appeal is one of profound and vital interest to thousands of ranchers in the irrigated districts of the West, who are annually being subjected to illegal, unconstitutional exactions because they have heretofore been unable to procure an adequate and authoritative decision upon the constitutional question herein presented. The bondholders are the only ones objecting to the jurisdiction of this Court. They seek to evade a determination of this question upon its merits, because to

do so will end the illegal exactions by which they are now profiting.

WHEREFORE, it is respectfully submitted that this Court has jurisdiction of this appeal.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLANT'S REPLY TO BRIEF OF AMICUS CURIAE

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APPELLANT'S REPLY TO BRIEF OF AMICUS CURIAE

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TEXTS CITED

Circular No. 72 of the Department of Agriculture of the Federal Government on the Financial Settlements of Defaulting Irrigation Enterprises prepared by Wells A. Hutchins, Associate Irrigation Economist, Division of Agricultural Engineering, Bureau of Public Roads 14

Comes now the appellant and respectfully submits the following for reply to Brief of Amicus Curiae, Erle J. Barnes as Director of the Department of Conservation and Development of the State of Washington.

The brief of amicus curiae illustrates the process of obfuscation by which the real issue involved has been obscured and avoided in the State Supreme Court. The facts pleaded in the complaint and admitted on demurrers are ignored. The decisions of the State Supreme Court construing this statute in vital particulars are not referred to, although discussed at length in appellant's brief.

I.

The Distinction Between Municipal Corporations Which Do and Do Not Exercise Governmental Functions.

Counsel rest their whole argument on the assertion: "An irrigation district is a quasi municipal corporation, and the rules of law applied to municipal corporations are generally applied to such districts."

The *same* rules of law *do not* apply to *all* "municipal corporations". There are two distinct classes of municipal corporations:

(a) Municipal corporations created as arms of the State for the discharge of governmental functions,

and exercising the concomitant power of general taxation to raise the necessary funds to discharge those functions.

(b) Public corporations, mere instrumentalities of the state, exercising no governmental functions, and without the power to levy a general tax, but created solely for the purpose of erecting a local improvement of a public nature, and exercising only the power to levy special assessments *based upon and limited to benefits* conferred.

The question herein presented cannot be decided without reference to this distinction. Counsel for the appellees and for amicus curiae deliberately avoid a consideration thereof, despite the challenge of the numerous citations establishing it in appellant's opening brief, pages 12 to 24.

The taxing power of a "municipal corporation" is determined by the functions which it discharges.

In *Beach v. Leahy*, 11 Kansas, at page 31, Mr. Justice Brewer said:

> "The mere fact that these organizations are declared in the statute to be bodies corporate, has little weight. We look behind the name to the thing named. Its character, its relations and its functions determine its position, and not the mere title under which it passes."

An irrigation district does *not* "exercise very broad powers, including those relating to indebtedness and taxation", as stated on page 8 of the brief of amicus curiae. It exercises only those powers which are expressly conferred upon it by statute, and its power to tax is rigidly limited by the statute and the decisions of the State Supreme Court.

> *Board of Directors of the Middle Kittitas Irrigation District v. Peterson*, 4 Wash. 147, 152; 29 Pac. 995, 996.

An irrigation district is not a true municipal corporation. It exercises no governmental functions.

An irrigation district is without power to levy a general tax of any kind.

An irrigation district is a public corporation, namely a mere instrumentality of the State created solely for the purpose of erecting local improvements. Its only power of taxation is the limited power to levy an assessment against the individual landowner in proportion to and *limited by* benefits conferred upon the individual's land.

See Brief and Argument of Appellant, pages 17 to 30.

Such an assessment levy must be justified, if at all, as a special assessment for a local improvement.

II.

Nature of a Special Assessment

It was admitted by Mr. Thorgrimson, counsel for appellees, on oral argument before this Court, and is admitted by counsel for amicus curiae in their brief (p. 7.) that the levy here involved is "in the nature of special assessments constitutionally justified by benefits upon the property assessed."

It is pleaded in the complaint (R. 4, 5, 6, 7.), and admitted by demurrers (R. 15, 16, 17.) that the assessment in this case substantially exceeds appellant's maximum benefits. In our opening brief, pages 35 to 56, we demonstrated that an assessment against a particular piece of land for local improvements (including an irrigation system) in substantial excess of the benefits accruing to that particular land by reason of the improvements constitutes the taking of property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution. Neither appellant nor amicus curiae have attempted to answer this argument, nor to justify the assessment involved under the universally accepted decisions cited.

This assessment must be either a general tax or an assessment. It must be legally justified as one or the other. No attempt is made to justify it as a

general tax. It is admitted that it is an assessment. Yet no attempt is made to demonstrate wherein it complies with the fundamental principle that individual assessments may not be levied in excess of maximum individual benefits. It is admitted that this assessment does substantially exceed the maximum benefit, and that it was levied without regard thereto. (R. 4, 5, 6, 7.)

This is the only question in the case. It has been adroitly avoided. We assert that this levy can be justified neither as a general tax nor as a special assessment, and certainly it cannot be justified as a mongrel, having some of the ear marks of each, but the legal and constitutional pedigree of neither.

Appellant does not deny that "the state has full and exclusive authority to determine what form improvement districts shall take and what plan of taxation shall be employed for their costs" (Brief of Amicus Curiae, p. 4), but appellant contends that when the state has exercised that power and has created a public corporation and determined that its sole function shall be the erection, operation and maintenance of an irrigation district system, and that its sole power of taxation shall be that of special assessment, that corporation must thereafter exercise the power of assessment in conformity with funda-

mental principles of constitutional law. It may not levy assessments in substantial excess of, or without regard, to the benefits conferred upon the individual. However broad the discretion of the State in the premises it cannot authorize a corporate improvement district to appropriate private property without due process of law.

III.

Analysis of Cases Cited in Brief Amicus Curiae and Their Application Herein.

Counsel have cited a number of decisions of this court from which they seek to draw the inference that this court will in no circumstances interfere with the exercise of the power of taxation by the state or its instrumentalities. Those decisions do not establish any such rule. Taken as a whole they establish the following propositions:

1. The legislature of a state may *by legislative act* create a local improvement district, determine aggregate and individual benefits, and the courts will conclusively presume that adequate hearings were held antecedent to the enactment, and so will not interfere with or question the result.

2. The Legislature may by general law delegate to a subordinate body the power to create a local improvement district, in which event the constitution

guarantees to the individual landowners a hearing upon each of the following (among others) points:

(a) Whether his land received any benefit, and so may be included;

(b) The maximum benefit to the district as a whole;

(c) The apportionment of aggregate benefits to individual tracts, namely the determination of that portion of the aggregate benefits he is to pay.

3. When the Legislature delegates to a subordinate unit the power to create a public improvement district, it may also by general law prescribe the rule, or measuring stick, whereby aggregate benefits are to be apportioned against individual tracts of land.

4. The rule of apportionment, i. e., the measuring stick, by which aggregate benefits are allocated, established by a general law of the state, will not be disturbed by this court unless it is obviously wrong and unjust.

5. When the subordinate body (an irrigation district) applies the measuring stick prescribed by general law, in good faith, this court will not disturb the results, despite the fact that the result is not mathematically accurate or seemingly works a hardship in an individual case.

6. *But when the subordinate body is required to apply the rule, i. e. the measuring stick, established by the legislature, an assessment based upon any other rule of measurement is void.*

7. *When the subordinate body does apply the rule, i. e. the measuring stick, established by the Legislature, the result established by such application is binding on both parties, and establishes*:

(a) The maximum liability of the individual landowner for assessment; and

(b) The limitation of the power of the district to levy against his lands, from which it follows that if the assessment is levied without reference to the rule prescribed by the Legislature, or if the result of the application is disregarded, the assessment is void.

In this case, it is alleged and admitted that the assessment is levied without regard to the legislative rule, in that it admittedly exceeds the maximum benefit accruing to appellant's land, and

> "* * * That no part of said levy is made on account of or with reference to any special benefit accruing to the real property of the plaintiff hereinabove referred to. That said assessment has been levied for the purpose of creating a fund to take up or eliminate the deficiencies in the bond interest and bond retirement funds of said irrigation district, due wholly or in part to a failure of certain landowners within the district to pay assessments which have hereto-

fore or will hereafter be levied against lands in said district belonging to such other persons.

"* * * and that they propose to make such assessments without reference to the special benefits which have accrued to the real property of this plaintiff * * * but to be governed and determined in making said assessments solely by a consideration of the amount of money required to pay said indebtedness." (R. 6, 7.)

Appellant complains because the district intentionally disregards the results produced by application of said legislative rule, and has levied an assessment in substantial excess of the amount of the benefits accruing to his land under that rule. Appellant does not complain because his lands were included in the district. He admits some benefit. He does not question the fairness of the rule or measuring stick for the apportionment of aggregate benefits. He has admittedly paid the full amount of the benefits accruing to his land upon the application of that rule. His sole contention is that his liability is limited by the amount so determined and paid, and that the assessment objected to herein is invalid because it admittedly exceeds that amount and was levied with a deliberate intention to disregard the amount of his maximum benefit as demonstrated by that rule.

What difference does it make that the rule of apportionment is fair and reasonable when it is admitted that the district arbitrarily and intention-

ally disregarded that rule and levied assessments solely upon a consideration of the amount of delinquencies accrued?

What difference does it make that the rule of apportionment is fair if the result of its application is to be disregarded and levies made in excess of the amounts of benefits accruing to the appellant under it?

IV.

Manner of Determining Benefits Herein.

Nor can this objection be met by the contention that the benefits are allocated annually. A determination of benefits whenever made is a judicial proceeding wherein the amount of benefits is determined upon a judicial consideration of all elements of benefit, and of those elements only.

> *Union Trust Company, as Executor, v. Carnhope Irrigation District, et al.*, 132 Wash. 538; 232 Pac. 341; 234 Pac. 277 (on rehearing).

It is alleged and admitted (R. 6, 7.) that in levying this assessment the Board of Directors considered neither the several elements of a benefit nor the maximum benefit accruing to the appellant, but that "no part of said levy is made on account of or with reference to any special benefit accruing to the real property of the plaintiff hereinabove referred

to," (R. 6.) and that in making future assessments the Board proposes to be "governed and determined in making said assessments solely by a consideration of the amount of money required to pay said indebtedness, principal and interest." (R. 7.)

The Board of Directors admittedly did not act judicially in levying this assessment, nor in considering the elements of benefit, nor in determining the maximum benefit. They arbitrarily levied the assessment upon a consideration of one fact only, to-wit, the requirements of the bond issue, which is *no* element of benefit. It is thus alleged and admitted, so far as the annual hearings are concerned, that the Board has not and does not intend to act judicially in determining either the elements of benefit or the maximum benefit to this appellant's land, but has expressly declared its intention to disregard the maximum benefit however or whenever established.

On page 9 of the brief of amicus curiae it is said:

> "The rule of enhanced value determined immediately after the construction of the improvement, as contended for by the appellant, is impracticable, inaccurate and unfair when applied to an irrigation district."

The fact remains that this rule is considered an unequivocally announced one of the Supreme Court of the State of Washington.

"* * * Volumes have been written upon the question of benefits, and a multiplicity of theories have been advanced by different courts and text writers as to the basis upon which the benefits should be determined, but the sound rule, and the one which it would seem all the authorities are coming to, is that these benefits are to be determined, as we have already indicated, by the increase of the market value of the property affected. * * *"

Union Trust Company, as Executor, v. Carnhope Irrigation District, et al., 132 Wash. 538, 541, 542; 232 Pac. 341, 342.

After an extended consideration of the authorities the Court further said, on page 548 in 132 Wash., and page 344 in 232 Pac.:

"Sanctioned by law and fortified by authority as this rule is, it seems it is the proper one to adopt and one which the respondents should have followed in making the assessment, which should have been in proportion to the benefits accruing to the different properties. * * *

"In determining the enhancement of the market value a great many elements, of course, are to be taken into consideration; the market value of the property before the improvement, the nature of the soil, topography of the property itself, use of the improvement, its proximity and availability, its area, frontage, and all the various elements which go to determining the fair market value of a piece of property."

This opinion was affirmed upon a rehearing en banc, and has never been modified or overruled.

V.

Nature of an Irrigation District and Public Policy Regarding the Same.

It is not true that an irrigation district is in any manner distinguishable in its operation or its legal aspects from a drainage, diking or other form of public corporation. It is created solely for the purpose of increasing the value of real property by putting water upon the land by practically the same instrumentalities by which such districts take it off. This court has specifically so declared in *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 173; 17 Sup. Ct. 56; 41 L. Ed. 369, wherein the court quoted from *Board of Directors of Modesto Irrigation District v. Tregea*, 88 Cal. 334; 26 Pac. 237, as follows:

> " 'The formation of irrigation districts is accomplished by proceedings so closely analogous to those prescribed for the formation of swamp-land reclamation districts that the decisions with respect to the latter are authority as to the former, and we cite as conclusive on this point *People v. Hagar*, 52 California, 181; S. C. 66 California, 60. * * * ' "

The Supreme Court of the State of Washington so declared in *Kadow et al. v. Paul et al.*, 134 Wash. 539, 553; 236 Pac. 90, 95:

> " * * * Diking districts as well as irrigation districts are public improvements. The cost

in each is to be assessed against the property benefited."

It is further to be noted that counsel for amicus curiae cite drainage district cases in support of their contention herein, and the Supreme Court of the State of Washington in the instant case seeks to sustain its opinion by a quotation from *Kadow et al. v. Paul et al.*, supra, which dealt with the diking drainage system.

> *Roberts v. Richland Irrigation District, et al.*, 169 Wash. 156, 163; 13 Pac. (2d) 437, 440. (R. 28.)

On page 15 of their brief, counsel for amicus curiae assert that Congress has approved the Irrigation District Statute as applied herein. This we deny, but such approval would not give validity to a constitutionally void assessment. In passing we note that the principle of unlimited liability has been disapproved by another branch of the Federal Government, the Department of Agriculture, which, in its Circular No. 72 on the Financial Settlements of Defaulting Irrigation Enterprises, prepared by Wells A. Hutchins, Associate Irrigation Economist, Division of Agricultural Engineering, Bureau of Public Roads, on page 12 thereof says:

> "Blanket liability, where put to an extreme test, in cases where most of the land is unde-

veloped or defaults are due to other deep seated causes, defeats its ends; for abundant experience has shown that constantly pyramiding assessments will eventually make it impossible for even the best lands to continue paying. This is exactly the situation on several projects now facing readjustment. In such cases all payments from landowners finally cease, whereas the more prosperous landowners could and would continue paying were they individually liable. Furthermore, a landowner assured of individual liability has some incentive to improve his property and thus add a reflected value to the marginal lands; whereas a serious result of general liability is the mental depression and discouragement which grow upon landowners who find their assessments doubled and trebled by reason of failure of others to pay."

This quotation is pertinent in view of the implication made by counsel that the brief of amicus curiae in some measure represents a public interest.

WHEREFORE, we respectfully submit that the judgment of the State Supreme Court, herein, should be reversed.

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